Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

—against—

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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January 12, 1976

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Introduction

Respondents submit this brief in response to that for the United States as *amicus curiae*, filed after the briefs on reargument had been filed by the parties hereto.

I.

Responding to the Solicitor General's Brief

A.

The Solicitor General has come forward with a position never before advanced by either the State Department or

the Justice Department—a position which would constitute a major innovation in our law. He urges that there exists or should exist a "commercial" exception to the act of state doctrine directly analogous to a similar exception to the doctrine of sovereign immunity as set forth in the "Tate Letter," 26 Dept. State Bull. 984 (1952). So far as we can ascertain from the brief submitted by the Solicitor General, the United States is not at all concerned about whether petitioner or respondents prevail on this petition.[1] If we read the Solicitor General's brief correctly, the only interest the government has in this case is to avoid a decision based upon the broad proposition that in a "commercial" transaction a sovereign may always avoid an obligation by a "naked repudiation" of it. Br. p. 14.[2]

There is no reason for this Court to face the issue posed by the Solicitor General—in fact there is good reason for the Court not to face it. So major a change in our law should await a case in which the issue is squarely presented by the record. It is not so presented in this case. As we have pointed out repeatedly, this is not a "mere commercial transaction" and the respondent has not made a "naked repudiation" of any commercial obligation. There is no reason for the Court to "assume", with the Solicitor General, "that respondents in fact have repudiated a [commercial] obligation to make restitution to the importers", Br. p. 12; such is not the case.

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[1] After referring to respondents' contention that they had a legal entitlement to hold the monies in question on the basis of the 1960 decree of intervention, the Solicitor General says, Br. p. 11, "We take no position on the merits of this contention".

[2] See also Govt. Br. p. 16, where it is argued that a "mere repudiation of a commercial obligation" should not be given act of state protection and, to the same effect, see pp. 26, 28 and fn. 13 at p. 30.

At the risk of some repetition, we take the liberty of reviewing briefly the record facts relevant to the discussion at hand.

In September, 1960 the Cuban Government intervened (or nationalized) tobacco enterprises owned by Cuban nationals. That decree purported to nationalize not only the physical properties in Cuba but also the accounts receivable of the intervened firms. When, in the ensuing few weeks the petitioner made payment of those accounts to the interventor, the latter accepted those payments as belonging to him under the intervention decree. Such was his contention in 1960 when the intervention decree was promulgated and the money received, in 1969 when this case was tried in the district court, in 1973 when it was argued in the Court of Appeals, and today.

In *Palicio* v. *Brush & Bloch*, 256 F.Supp. 481 (1966), *aff'd* 375 F.2d 1011 (1967), *cert. den.* 389 U.S. 880, the issue related to payment for post-intervention shipments, and the court held that, pursuant to the intervention decree, the interventors were entitled to payment for such shipments. There has since been no dispute about that. In the course of the litigation, passing mention was made of the possibility that there might be some small amounts due for pre-intervention shipments, and in order to avoid extensive litigation over the right to a sum of money which seemed to be *de minimis*, respondents agreed that the former owners were entitled to such payments. This agreement (which the government now refers to as possibly having the effect of *res judicata*— see Govt. Br. p. 11), was quite properly disregarded by Judge Bryan in this case. He had presided over the proceedings in *Palicio* and was fully aware of the circumstances under which that stipulation was made—indeed the circumstances are reflected in his opinion in *Palicio* v. *Brush & Bloch, supra* at 489, fn.

8 as well as in his opinion in this case. J.A. 43a. It is hard to see the *Palicio* agreement as a meaningful waiver of rights which should be held to bind the parties and both the District Court and the Court of Appeals made their decisions without reliance thereon.

It was not until 1968, when this case was being prepared for trial, that the extent of the former owners' claim for pre-intervention shipments became apparent. Up to that time petitioner's contention (repeated in its petition for certiorari now pending undetermined before this Court, *sub nomine Saks & Co. et al.* v. *Republic of Cuba,* No. 73-1289) was that it had fulfilled its obligation to the former owners by making payment to the interventor with the knowledge of and without objection from the former owners who, it was argued, had waived any rights they might have had by their silence. It was not until trial that petitioner argued that if such payments were held insufficient to satisfy the debt to the former owners, petitioner was entitled to receive an equivalent amount from the respondents. Indeed, petitioner's pleadings had made no such claim and a cause of action against respondents was not pleaded until the end of the trial, when petitioner's answer was amended. (Trial minutes, pp. 799-801). There had been no previous demand by petitioner upon the respondents for the return of the payments. (Trial minutes, p. 799).

Counsel for respondents, in making his closing argument at the District Court level, made respondents' position perfectly clear: the funds in question were claimed under authority of the intervention decree.[3] In the Court of Appeals respondents made the same argument.

[3] Counsel said in that argument, at pp. 854-856 of the Trial Transcript:

"... [T]he result is the same, regardless of whether Cuban law governs or New York law governs. If it is Cuban law that governs, I assume the issue is clear enough, the money went to Cuba, the interventors had seized and were entitled to seize the bank accounts of the owner-plaintiffs, as this money came in, they accepted this money, and under Cuban law I don't think it will be argued that they were [not] entitled to it, if the law of Cuba governs.

"But suppose the law of New York governs. Well, what is the law of New York? The law of New York is the act of state doctrine. And under the act of state doctrine the Cuban government, in accepting, expropriating, seizing, nationalizing, whatever other words you want, to take this money, has done so pursuant to a regulation, a law, a decree of the government of Cuba, and therefore the courts of this state will not look into the matter nor will the federal court.

"Now, I am not talking about the extraterritorial effect of an act of state. I am talking about a territorial effect, namely, the seizure or the acceptance or the appropriation of this money when it got down to Cuba. We are not now concerned with whether they expropriated debts on September 15th. The question is what happened on October 1st, and October 15th and on November 8th and December 12th, when the money came down. And at that time the Cuban government took this money and under the act of state doctrine it belongs to the Cuban government."

As an additional argument, respondents contended in both the District Court and the Court of Appeals, that since ". . . a breach of contract [is] considered an act of state both in the federal courts and in our court", *French* v. *Banco Nacional,* 23 N.Y.2d 46 at 66 (1968) the refusal to acquiesce in the quasi-contractual obligation sought to be imposed by a foreign court, was *a fortiori* an act of state.

Even under this alternative theory respondents did not claim and do not claim now that a "naked repudiation" or a "mere refusal to pay" constitutes an act of state, because we do not see that on the record any such issue is raised. The "refusal" or "repudiation" in question was not an effort by a "tobacco merchant" to avoid an ordinary commercial debt arising out of trade in cigars. It occurred in the context of the intervention decree.

Thus the government's arguments are irrelevant in this case. Nevertheless we feel that its brief should not go without answer since it does raise an issue of considerable importance. We suggest that the government's analysis is at fault in a number of respects.

B.

The Solicitor General's distinction between "commercial" and "public" acts of sovereign is drawn from the field of sovereign immunity. The experience with the distinction there is not such as to justify its extension to the act of state doctrine. The restrictive theory of sovereign immunity was first set forth in the Tate letter, 26 Dept. State Bull. 984 (1952), and as originally promulgated was a self-imposed guide announcing the general policy to be followed by the State Department in considering requests made by litigants for a suggestion of immunity. The distinction made by the Tate letter between *jure imperii* and *jure gestionis*, inadequately defined in the original letter, has proven to be quite unworkable. For example, the Solicitor General considers that a contract by a sovereign to purchase clothing for its army is a commercial act (Govt. Br. p. 30, fn. 13), a result which the Court of Appeals termed "astonishing" in *Victory Transport Inc.* v. *Comisaria General*, 336 F.2d 354 at 359 (2d Cir. 1964), *cert. den.* 381 U.S. 934. And Judge Weinfeld only last year held that the purchase of goods for the use of the armed forces was entitled to a grant of immunity. *Aerotrade, Inc.* v. *Republic of Haiti*, 376 F.Supp. 1281 (S.D.N.Y. 1974). As the court points out in *Victory Transport, supra*, many commentators are of the opinion that the distinction is impossible of application.[4] In practice the Tate letter distinction has been followed or ignored by the State Department as called for by the foreign policy requirements of the United States. See, for example, *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198 (2d Cir. 1971), *cert. den.* 404 U.S. 985; *Spacil* v. *Crowe*, 489 F.2d 614 (5th Cir. 1974); *Rich* v. *Naviera Vacuba*, 197 F.Supp. 710 (E.D. Va. 1961), *aff'd.* 295 F.2d 24 (4th Cir. 1961).

[4] In addition to the authorities cited by Mr. Justice Brennan in footnote 13 of his dissent in *First National City Bank* v. *Banco Nacional*, 406 U.S. 759 at 780, and by the Court in *Victory Transport*, see Falk, *The Immunity of Foreign Sovereigns in United States Courts*, 6 N.Y.U. J. Int'l. Law and Politics 473, 477 (1973).

The *Rich* case is particularly instructive. In that admiralty action the State Department filed a suggestion of immunity to bar prosecution of claims clearly *jure gestionis* —for example, suits on judgments obtained by longshoremen for injuries sustained while performing services for the former owner of the ship; a claim for fuel and necessaries furnished to vessels owned by Naviera in 1959; and a claim for wages for members of the crew of the ship. When libellants relied upon the Tate Letter and its restrictive theory of immunity as justification for their claims, the District Court honored the State Department's suggestion of immunity, stating "No policy with respect to international relations is so fixed that it cannot be varied in the wisdom of the Executive. Flexibility, not uniformity, must be the controlling factor in times of strained international relations." 197 F.Supp. at 724.

The distinction between *jure imperii* and *jure gestionis* was totally inadequate to meet the exigencies of the situation in the *Rich* case. More than that, there is no hint in the opinions of the district court and the Court of Appeals, nor so far as we know, in the court records in the case, of the serious and critical political issues which lay behind

the entire episode.[5] In *Spacil* v. *Crowe, supra* at 619-621, the court elaborated upon the dangers in requiring even a statement of reasons for Executive action. *Cf., Aerotrade Inc.* v. *Republic of Haiti, supra* at 1284-1285.

The courts, dissatisfied with the undefined standards of the Tate letter, have attempted refinements of the *jure imperii* and *jure gestionis* distinction, most notably in *Victory Transport, Inc.* v. *Comisaria General,* 336 F.2d 354, 365 (2d Cir. 1964), *cert. den.* 381 U.S. 934. There the court sought to define those cases in which sovereign immunity would be granted by setting forth a list of imprecise categories. Even so, the court, evidently sensitive to the inadequacy of its formulation, found it necessary to leave an escape hatch, saying at 360:

> "Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement."

Indeed, the failure of restrictive immunity to safeguard against untoward political consequences has been sufficiently recognized so that both the State Department and the courts have agreed that, even after suit against a sovereign, execution of a resulting judgment upon the foreign

[5] The matter is treated *in extenso* in Chayes, Erlich and Lowenfeld, 1 INTERNATIONAL LEGAL PROCESS 87-144. As appears from that discussion, the very day before the lawsuit arose the Cuban government had returned to the United States an Eastern Airlines plane which had been hijacked, following upon a promise by the United States that it would return vessels illegally brought into the United States.

sovereign's property is not permitted. Absolute immunity from execution has been retained.[6]

The defects in the restrictive theory would be greatly enlarged if applied to the act of state doctrine. The Solicitor General seeks to assimilate the sovereign immunity doctrine to that act of state as though the two doctrines were opposite sides of the same coin. We suggest that this is not so. The act of state doctrine is more complex and serves more and different concerns. *First National City Bank* v. *Banco Nacional,* 406 U.S. 759, 773 (Powell, J. concurring), 789, fn. 13 (Brennan, J. dissenting).

The grant or denial of sovereign immunity relates only to whether a domestic court will accept jurisdiction of a case against a foreign sovereign, thus possibly incurring its ill-will to a greater or lesser extent. A grant or denial of immunity implies no finding one way or the other on the merits or even that the merits will be reached. The granting of immunity forecloses judicial consideration of the merits; its denial merely allows the suit to proceed on the merits of the claim including any defenses the sovereign may have such as the act of state doctrine.

The act of state doctrine, on the other hand, necessarily goes to the merits. Absent the doctrine, our courts

[6] See Department of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 267 (1974); Note, *Sovereign Immunity,* 54 Am. J. Int'l. Law 640, 643 (1960); *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrlsen,* 43 F.2d 705 (2d Cir. 1930), *cert. den.* 282 U.S. 896; *New York and Cuba Mail Steamship Co.* v. *Republic of Korea,* 132 F.Supp. 684 (S.D.N.Y. 1955); *United States* v. *Guaranty Trust Co.,* 60 F.Supp. 103, 105 (S.D.N.Y. 1945); *Et Ve Balik Kurumu* v. *B.N.S. Int'l. Sales Corp.,* 25 Misc. 2d 299, 204 N.Y.S. 2d 971 (Sup. Ct., N.Y. Co. 1960), *aff'd.* 17 A.D. 2d 929, 233 N.Y.S. 2d 1013 (1st Dept. 1962); *Weilamann* v. *Chase Manhattan Bank,* 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct., Westchester Co. 1959).

would be required to pass judgment on the legality *vel non* of the acts of a foreign sovereign. At this level the possibility of "embarrassment" becomes critical.

The Solicitor General persists in treating the question of embarrassment as a matter affecting only the relations between foreign states and the United States government, and in its brief constantly poses the problems of possible embarrassment to our foreign relations should a court hand down a decision in favor of United States interests and against those of a foreign sovereign (*e.g.*, Br pp. 16, 39). We should have thought that, by this time, a reading of the opinion of the court in *Banco Nacional* v. *Sabbatino*, 376 U.S. 398, 432-433 and of the dissenting opinion in *First National City Bank* v. *Banco Nacional, supra* at 759, 777, 778, should have made it clear that a much more important element of embarrassment arises out of the possibility that the court may decide *in favor of* the foreign government and against the position taken by the State Department so that the judiciary will "become embroiled in the politics of international relations to the damage not only of the courts and the Executive but of the rule of law". *First National City Bank* v. *Banco Nacional, supra* at 778 (Brennan, J. dissenting).[7]

[7] See also the comments of former Attorney General Katzenbach on the famous *Rose Mary* decision, *Anglo Iranian Oil Co.* v. *Jaffrate*, [1953] 1 Weekly L.R. 246; 1953 Int'l. L.Rep. 316. That case arose out of the nationalization by Iran of oil wells belonging to a British owned company and the litigation involved title to the oil taken from those wells. A ship carrying the oil was attached while in the Port of Aden and the Colonial Court held that the nationalization did not effectively pass title. Mr. Katzenbach says:

> "The English government had unequivocally expressed and widely circulated its views—what the court [in Aden] called its 'public policy'—with regard to the 'illegality' of the Iranian nationalization decree; as an incident of diplomatic pressure, it was clearly desirable from the government's point of view to limit the salability of Iranian oil in the world market. That the English court could have responsibly ignored this policy is inconceivable." Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087 at 1155 (1956).

It may be that the restrictive theory of sovereign immunity will compel the judiciary, on occasion, to reach issues which it should not. We regard this as unfortunate, but perhaps it is a necessary consequence of the restrictive theory.[8] But at least such occasions will be limited to situations in which the acts of the foreign sovereign have been outside its territory; as to acts done within the sovereign's territory, the court can still rely on the act of state doctrine. There is likely to be less offense to a foreign sovereign when the court of the forum passes upon the sovereign's attempt to exercise extraterritorial power. And the dangers are further mitigated, to a degree, by the State Department's ability, under *Ex Parte Peru*, 318 U.S. 579 to exercise an unlimited discretionary authority to preclude adjudication, as in the *Rich* and *Spacil* cases. But no such discretionary authority exists, nor can it exist, in the application of the act of state doctrine because no authority can or ought to be given the discretionary and unreviewable power to thrust a court into the midst of a controversy which is political in its nature. Nor can the court itself guard adequately against embroilment in a political question. A court will not have and under normal conditions cannot possibly get all of the data necessary to determine such questions and the very quest for information may itself create political issues. Furthermore, the judiciary is not delegated the task under our Constitution to consider or decide such questions and is not competent to do so.

[8] The restrictive theory of sovereign immunity has never been passed upon by this Court.

In the situation hypothesized by the Solicitor General, the dangers inherent in every controversy concerning the acts of a foreign sovereign are greately increased. A rule of law which provides that a sovereign will not be permitted to avoid a commercial obligation through a "naked repudiation" clothed as an act of state is superficially appealing. After all, why should not a foreign nation be required to live up to its commercial obligations the same as any one else?

Such a view is simplistic. We live in a complex world where food and oil may sometimes be as potent a weapon as tanks and guns. We have seen in the past few years many instances in which great political issues were raised, not by marching armies but by transactions which to a casual observer might appear commercial. The withholding of oil by Middle East oil producers, the sale of wheat by the United States to the Soviet Union, the attempted world-wide embargo of Chilean copper—all of these are illustrative of commercial transactions with very profound political implications.[9]

Indeed, it is likely that the more "naked" the repudiation, the more political the background. As we pointed out in our Brief on Reargument, p. 11, nations like the respondent Cuba can exist only through trade, and a repudiation of a commercial obligation is most unlikely unless there are reasons for it—either commercial or political reasons. Pleas of act of state are not and can never be part of the normal arsenal of a trading nation. It is only in the unusual case, and we suggest primarily in the political case, in which this defense is called upon.[10]

[9] See *Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106, 112 (2d Cir. 1966), *cert. den.* 385 U.S. 898: "Hard currency is a weapon in the struggle between the free and the Communist worlds."

II.

Responding to the Legal Adviser's Letter

We assume that the letter from the Legal Adviser, appended to the Solicitor General's brief, is intended as the most recent of the "Bernstein" letters[11] and we urge that insofar as it goes beyond that brief, it should be disregarded for the reasons given by six Justices of this Court in *First National City Bank* v. *Banco Nacional, supra* at 772, 773, and 776.

[10] The Solicitor General's further proposal to modify the act of state doctrine's territorial requirement is also misconceived. As the government acknowledges, Br. p. 31, that requirement has never been thought to be a shorthand for the proposition that the doctrine should apply only "where under commonly accepted conflict principles, the substantive law of the foreign state controls the adjudication of the merits of the dispute". On the contrary the territorial requirement "rests on the deeply embedded postulate in international law of the territorial supremacy of the sovereign, a postulate that has been characterized as the touchstone of private and public law", *Sabbatino, supra* at 445 (White, *J.*, dissenting). There is no need to import into the act of state doctrine concepts of conflicts of law which may be irrelevant to the basic postulate of which Mr. Justice White speaks.

Even by the government's test, the act of state here was performed within the territory of Cuba. Certainly if, as we have contended, the intervention decree and the consequent appropriation of funds as they came into Cuban territory was the act of state in question, the act took place within the territory of Cuba, and there is nothing in the law of conflicts to the contrary. Even if the transaction be viewed as the "naked repudiation" of a debt (commercial or otherwise), it is clear that the debt had its situs in Cuba, that the repudiation took place in Cuba and that even if we apply commonly accepted conflict principles, the relevant transaction took place in Cuban territory. See the Court of Appeal's opinion, J.A. 23a-24a.

[11] *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954).

There are additional considerations which compel a rejection of the "Leigh" letter:

(1) As we have already shown, this is not a commercial transaction.

(2) As we have also shown elsewhere, there is no question of international law in this case and hence no occasion to reconsider the *Sabbatino* decision. See respondents' Brief on Reargument, pp. 1-11.

(3) As we have also shown, even if there were reason to reconsider the *Sabbatino* decision, that decision should be reaffirmed. See respondents' Brief on Reargument, pp. 12-13. The Legal Adviser does not respond to our discussion or even refer to it.

(4) The Legal Adviser's position is contrary to that taken by the State and Justice Departments in the *Sabbatino* litigation and thereafter. See Brief for the United States as *Amicus Curiae* in *Sabbatino*. See also Hearings before the Committee on Foreign Affairs, House of Representatives, 89th Congress, First Session, on H.R. 7750 (1965), pp. 991, 1033, 1060, 1234; Hearings before the Senate Committee on Foreign Relations, 88th Congress, Second Session on S.2659, 2660, 2662 and H.R. 11380 (1964), pp. 449, 618. There the United States maintained that an international law exception to the act of state doctrine would seriously prejudice the conduct of foreign relations and urged its rejection. That succeeding administrations have differed so greatly in their assessment of the needs of foreign policy, and of the proper role of the judiciary in our governmental structure, emphasizes the wisdom of the view that it is the judiciary alone which must define the contours of the act of state doctrine and determine its application.

(5) The rule suggested by the present Legal Adviser is categorical and unrelated to any specific case or set of circumstances. It would preclude the "balancing of interests" and "careful examination of the facts in each case" found appropriate by Mr. Justice Powell in *First National City Bank* v. *Banco Nacional, supra* at 774-776.

We find it particularly surprising that the Legal Adviser should have so blandly made the determination "that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations" (Govt. Br. p. 45); it is difficult to see how any responsible government official could have made such a statement in the face of recent experiences in cases like *Rich* v. *Naviera Vacuba, supra,* and *Spacil* v. *Crowe, supra.* Similarly, this Court cannot credit an assertion that the Legal Adviser or anyone else can foresee every instance in which the validity of an act of state under international law may be placed in issue and the consequences of adjudication thereof.

The Leigh letter in this respect differs markedly from its predecessors. The Legal Adviser's opinion in the *Bernstein* case, *supra,* and the letter of Mr. Stevenson in *First National City Bank* v. *Banco Nacional, supra,* were all carefully confined to a narrow set of known circumstances and made no effort to legislate broadly in this most complex field.[12]

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[12] We are not impressed by the Legal Adviser's reference in fn. 2 of his letter (Govt. Br. p. 47) to cases in foreign jurisdictions and particularly to the cases which related to the Chilean expropriation of United States owned property. We suggest that in those cases the courts were, wittingly or unwittingly, performing a political function in enforcing a blockade against the democratically elected government of Chile, in precisely the same way that the government of Great Britain enforced its economic blockade upon the Mossadegh government in 1953. See *ante,* p. 10 fn. 7. Hindsight teaches us that perhaps it would have been better for the maintenance of the independence of the judiciary and respect for the rule of law had the German and French courts stayed out of the Chilean controversy. In view of the recent disclosures respecting the role of the Executive Branch of our government in Chile during the Allende government, we may be thankful that the same issue was never squarely presented to our courts and that, if it had been, we had available the *Sabbatino* doctrine to avoid the consequent embarrassment to the judiciary.

CONCLUSION

For the reasons stated in this and prior briefs, the Writ of Certiorari was improvidently granted and should be dismissed. Alternatively, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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